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The Invisible Branch: Funding Resilient Courts Through Public Relations, Institutional Identity, and a Place on the “Public Radar”

Chief Justice Paul J. De Muniz¹

I. THE JUDICIARY CANNOT WAIT FOR THE OTHER BRANCHES TO COME TO THEIR CONSTITUTIONAL SENSIBILITIES

State courts across the country are struggling under prolonged budget cuts severe enough to jeopardize judicial infrastructure and constitutional democracy. References to tipping points, breaking points, and points of no return pepper conversations on the topic. Unfortunately, the rollercoaster of budget cuts and funding crises is nothing new to the judiciary.

For years, state courts across the nation have been scraping by on the much reduced level of support they get from state and local governments.² The financial crisis of 2008 has further strained court budgets and that strain “is being felt in courthouses and communities across the country.”³ Because of the unprecedented nature of the prevailing economic climate, history’s talent to inform and instruct is limited. Nevertheless, one message is clear: judicial efforts to avoid ongoing cuts have not and are not working. For instance, direct appeals to the legislature have not brought lasting relief, and “co-equal third branch”⁴ and “constitutionally adequate funding”⁵ arguments have gone largely unheeded. It is not that the arguments lack validity or that the judiciary lacks constitutional entitlement. It is simply that such justifications seem to fall flat when there is not enough money to go around.

¹ Chief Justice, Oregon Supreme Court. The author acknowledges the significant contributions of Kimberley Mansfield, J.D. Candidate, Willamette University College of Law, 2013, and Oregon Supreme Court Extern, in the preparation of the article.

² John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18.

³ *Id.*

⁴ See Ed Collister, *Are We Not Treating the Judiciary as the “Ugly Duckling” of Government?*, 9 KAN. J.L. & PUB. POL’Y 302, 313–15 (1999), for a brief exposition of the “co-equal third branch” argument. Collister argues that the lack of funding for the judiciary indicates its inequality compared to the legislative and executive branches. *Id.*

⁵ See generally Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993), for an exposition of the “constitutionally adequate funding” argument. Jackson argues that the necessity of funding the judicial branch is implicit in its establishment under federal and state constitutions. *Id.* at 223–24.

It is no surprise then, that the last two presidents of the American Bar Association have made state court funding their top priority. In 2010 the American Bar Association launched the Task Force on Preservation of the Justice System to study the debilitating effects of the current funding crisis as well as prospective interventions.⁶ Fresh strategies emerging both from the Task Force and from individual state judiciaries reflect three key points: first, internal belt tightening alone cannot offset the effects of perpetually plummeting judicial budgets; second, the road to sufficient and systematic judicial sustenance is through the legislature; and third, effective and enduring access to those legislative purse strings will require broad and lasting public support.

So far, however, while many recently minted strategies place deserved and welcomed emphasis on outreach, communication, and education, those strategies do not contemplate the creation of enduring public-stakeholder involvement. Because the present funding dilemma is chronic, escalating, and constitutionally charged, it will not be solved by an ad hoc, crisis-by-crisis type of buy-in. Instead, an odds-on approach will envision public buy-in on an institutional plane and will call it a relationship. Public awareness alone will not be enough. The goal must be public relations.

The critical distinction between public awareness and public relations is the difference between merely disseminating information and partnering in its understanding and incorporation. Accomplishing the latter will depend on how the judiciary chooses to identify itself, conduct its affairs, and to what level those notions will pervade the everyday public consciousness. A wisely selected identity will be key. When the public is able to anchor buy-in to that institutional presence instead of a single issue, doors and minds will open toward understanding the judiciary's crucial role, the gravity of what is at stake, and the necessity for changes that will facilitate resilient courts and, ultimately, resilient justice.

This article examines the sensitivity and self-inquiry involved in such a proposition. It begins by examining the growth of the judiciary in the constitutional context of separation of powers, and reviews the present crisis and subsequent effects on judicial funding and institutional effectiveness. Finally, the article focuses on the shortcomings of stop-gap thinking and, alternatively, how the capacity for public relations to enhance judicial prospects will turn on the establishment of a favorable institutional identity.

6 Press Release, Am. Bar Ass'n, Incoming American Bar Association President to Appoint Ted Olson & David Boies to Task Force on Justice System (Aug. 6, 2010), *available at* <http://www.abajournal.com/files/olson.pdf>; *Task Force on Preservation of the Justice System*, A.B.A., http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system.html (last visited Dec. 30, 2011) (providing current information on the Task Force's actions).

II. THE JUDICIARY AS AN INSTITUTION REQUIRING BUDGETARY PROTECTIONS IS A RECENT CONCEPT

It is helpful to examine the growth of the American judiciary in the context of the separation of powers doctrine. Of particular relevance is why, despite a rich history in this country of embracing the theory of divided government, state judiciaries fail to be more insulated from funding decisions made by the other two branches of government.

At the heart of the separation of powers doctrine is a mistrust of human nature.⁷ Montesquieu, who is widely credited with first articulating the divided government theory,⁸ wrote, “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates . . . there can be no liberty.”⁹

The solution, according to John Locke and James Harrington, was to divide government into different branches.¹⁰ However, those early models of government did not include a judicial branch.¹¹ Montesquieu, Locke, and Harrington all conceptualized tripartite divisions of power, yet none of the three philosophers posited that the judiciary should be a co-equal branch of government.¹²

The judiciary, however, gained new prominence under the United States Constitution. Given their experience with British rule, the Framers embraced the same fear of power as the philosophers who preceded them. “Ambition must be made to counteract ambition,” James Madison wrote in *The Federalist No. 51*.¹³

Yet, while the Framers opined that the judiciary should be a co-equal branch of government,¹⁴ they did not view the judiciary as an institution and thus did not design protections with such a model in mind.¹⁵ The motivation to protect the judiciary derived from two main phenomena.¹⁶ First, the framers were concerned about a lack of judicial independence

7 Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 373–74 (1976).

8 Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 595 (1986).

9 Levi, *supra* note 7, at 373–74 (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748), reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed., 1952)).

10 See Kurland, *supra* note 8, at 595.

11 *Id.*

12 *Id.*

13 *Id.* at 598 (quoting THE FEDERALIST NO. 51, at 347–48 (James Madison) (Jacob Cooke ed., 1961)).

14 See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980).

15 Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1005–06 (2004).

16 See *id.* at 990.

because colonial judges were under direct control of the king and had no salary protection.¹⁷ Second, the framers were concerned with the power that state legislatures had over their respective judiciaries. These fears were flamed by a series of legislative encroachments on judicial activity, especially in Rhode Island, in which, according to James Madison, "the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislatures who would be willing instruments of the wicked [and] arbitrary plans of their masters."¹⁸ Madison subsequently lobbied for the judiciary to be a co-equal branch of government.¹⁹ He was joined by Patrick Henry and John Marshall, who also pushed for an independent judiciary, which would be an able guard against the extra-constitutional actions of other branches of government.²⁰

As Michael Buenger noted, "[t]he Framers . . . rejected a judiciary whose . . . judgment — was dangerously subject to unwarranted intrusions by the executive and legislative branches, particularly with regards to the decisional process."²¹ To protect the decisional process the framers placed two relevant clauses in the United States Constitution: The Good Behavior Clause,²² which provided for the lifetime appointment of federal judges during good behavior; and the Compensation Clause,²³ which keeps judicial salaries from being reduced.²⁴ Hamilton highlighted the importance of judicial salary protections, contending that "[n]ext to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support."²⁵ Hamilton argued that "a power over a man's subsistence amounts to a power over his will."²⁶

The framers, however, still did not perceive a need to protect the institutional independence of the judiciary. Clauses protecting judicial budgets, therefore, remained absent from the constitution. At that time, however, the majority of state judiciaries were comprised of locally elected judges that were funded by local municipalities.²⁷ State legislatures generally paid little attention to the administrative structure of judiciaries because state appellate courts were often not funded from state treasuries,²⁸

¹⁷ *Id.* at 990, 992–93.

¹⁸ *Id.* at 998–99 (alterations in original).

¹⁹ *See id.*

²⁰ *See* Kaufman, *supra* note 14, at 687 n.98.

²¹ Buenger, *supra* note 15, at 1009–10.

²² U.S. CONST. art. III, § 1.

²³ *Id.*

²⁴ Jackson, *supra* note 5, at 225.

²⁵ *Id.* (alteration in original) (quoting THE FEDERALIST No. 79, at 531 (Alexander Hamilton) (Jacob Cooke ed., 1961)).

²⁶ *Id.* (emphasis omitted).

²⁷ Buenger, *supra* note 15, at 1012–13.

²⁸ *Id.* at 1016.

and trial courts largely controlled their own administrative structures.²⁹ In the absence of an institution to safeguard, the framers of both the state and federal constitutions did not seek to fortify the institutional independence of the judiciary.

For most of our history,³⁰ state judiciaries simply were not the complex institutions they are today. However, over time administrative structures have evolved significantly and the workload for state judiciaries has skyrocketed. This escalation can be credited to the coupling of the Framers' deliberate division of power among co-equal branches of government to protect personal liberties, and the Bill of Rights, the primary mechanism through which those liberties are protected.³¹ The job of ensuring that individual rights are not infringed has fallen to the courts, generating more cases and adding to the growth of state judiciaries.³²

Additionally, the increased complexity and importance of cases handled by state judiciaries has increased the administrative support required to enable their adjudication.³³ As Buenger notes,

The current debate on the level of the judiciary's independence [has to do] with the evolving and expanding role of state courts in American society. With abortion, euthanasia, environmental issues, election controversies, and even the legislative process itself, state judiciaries have become the fora for some of the most vexing political and social issues of our time. Unlike the past, state courts are finding themselves at the center of, and not the periphery of, many divisive political maelstroms.³⁴

The structure of state judiciaries also has changed. State judiciaries are no longer comprised of an attenuated collection of individual judges. Rather, today's state court systems are largely administered by state supreme courts, which, in a growing number of states, exercise administrative control over the entire judicial branch.³⁵ Reviews are mixed as to whether "unified" court systems actually produce either positive or negative results.³⁶ Nevertheless, one thing is clear: as state courts systems have consolidated and unified, they have transformed into institutions with their own identities.³⁷

With the change in structure have also come changes in funding. Even though the cost of funding courts has not significantly increased, the shift

²⁹ *Id.* at 1014.

³⁰ *See id.* at 1012–13.

³¹ *See* Kurland, *supra* note 8, at 604, 611.

³² *See id.* at 611.

³³ *See* Buenger, *supra* note 15, at 1011.

³⁴ *Id.* at 1019–20 (footnotes omitted).

³⁵ *See id.* at 1017–18.

³⁶ John K. Hudzik & Alan Carlson, *State Funding of Trial Courts: What We Know Now*, JUDGES' J., Summer 2004, at 11, 12–13.

³⁷ Buenger, *supra* note 15, at 1019–20.

to unified judiciaries and away from local funding has caused the judicial budget at the state level to increase substantially.³⁸ Subsequently, judicial budgets have become a target for state legislatures seeking to cut spending in tough economic times.³⁹

The process through which state judiciaries receive their funding also has evolved. Today, state legislatures and increasingly state executive branches are involved with setting judicial budgets.⁴⁰ In several states the governor drafts an initial budget,⁴¹ which then forms the floor from which the legislature makes further cuts.

Finally, as part of the push-back against legislative power, some states have limited the frequency and duration of legislative sessions.⁴² Reduced sessions of similarly underfunded legislatures mean that state bureaucracies handle many complex budget issues; and these bureaucracies often inadequately account for the constitutional mandate placed on judiciaries to administer justice impartially, completely, and without delay.⁴³

As state judiciaries have transformed into a unified organization, the judiciary has developed its own institutional identity. That self-perception has caused judiciaries to come together and begin to work to preserve their independence.⁴⁴ Still, salary and tenure protections remain the judiciary's only constitutional protections; meanwhile, legislatures reserve control over judicial budgets, the creation of court rules, and the structure of the courts.⁴⁵

Despite the judiciary's escalating institutional identity, so long as it remains at the fiscal mercy of its counterparts, inter-branch friction will regrettably continue and – particularly in economically contentious times – will remain unsurprising and, ultimately, counterproductive.

III. RECESSIONS, RESPONSES, AND RESULTS (OR LACK THEREOF): THE FUNDING CRISIS IS NO NOVELTY BUT ITS DEPTH IS A MATTER OF FIRST IMPRESSION

The United States has experienced thirteen recessions since the Great Depression.⁴⁶ Following years of continuous budget cuts, the recession of

38 *Id.* at 1028–29.

39 *See id.* at 1029.

40 *See id.* at 1028–29; G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 339 (2003).

41 Tarr, *supra* note 40, at 339.

42 *Id.* at 335.

43 *See id.* at 339; Buenger, *supra* note 15, at 1018–19; *see, e.g.*, OR. CONST. art. I, § 10 (constitutional mandate requiring courts to administer justice).

44 *See* Buenger, *supra* note 15, at 1016–17.

45 *Id.* at 1020–21.

46 Press Release, Bus. Cycle Dating Comm., Nat'l Bureau of Econ. Research (Sept. 20,

the early 1990s gave way to the expansion known as the “dot-com” era. During that period of higher-than-expected tax revenues, forty-three states enacted permanent tax cuts.⁴⁷ However, actual state government spending rose during this time. For example, legislators in Oregon changed the “kicker” law to provide for issuing refunds through a direct payment instead issuing them through a tax credit, when tax revenues exceed the forecasted amount by more than 2 percent.⁴⁸ That contradiction – the enactment of permanent tax cuts during temporary economic conditions – eventually proved unsustainable.

Near the end of 2001, the economy began to sour and the amount of money feeding state revenues began to decline.⁴⁹ Between 2001 and 2003, Oregon was among the hardest hit states in the country.⁵⁰ Oregon’s Judicial Department was cut by over \$50 million, or approximately 12 percent.⁵¹ Oregon courts were forced to close on Fridays for the last four months of the 2001–2003 biennium. Approximately 74 judicial branch employees were laid off and another 189 judicial department jobs were left vacant.⁵²

Downturns in the economy profoundly affect the courts for several reasons. To begin with, recessions have a two-fold effect on judicial functions and funding. Recessions tend to simultaneously increase court caseloads and decrease court funding. In other words, the gap between eroding resources and increasing demand compounds over the duration of a contraction. The recession of 2008, at times referred to as the Great Recession, spanned 18 months and was the longest contraction since World

2010), available at <http://www.nber.org/cycles/sept2010.html>; Bus. Cycle Dating Comm., *US Business Cycle Expansion and Contractions*, NAT’L BUREAU ECON. RES. (Sept. 20, 2010), <http://www.nber.org/cycles/cyclesmain.html#announcements>.

47 NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, *THE STATE TAX CUTS OF THE 1990S, THE CURRENT REVENUE CRISIS, AND IMPLICATIONS FOR STATE SERVICES* (2002), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=1379>.

48 OR. DEP’T OF REVENUE, *OREGON PERSONAL INCOME TAX STATISTICS: CHARACTERISTICS OF FILERS*, app. A at 40 (2010), available at http://www.oregon.gov/DOR/STATS/docs/101_406_10/101-406.pdf (detailing the history of the two percent “kicker” refund).

49 Paul J. De Muniz, Chief Justice, Or. Supreme Court, 17th Justice William J. Brennan Lecture on State Courts and Social Justice at New York University: Overturning Precedent: the Case for Judicial Activism in Reengineering State Courts, at 0:24:35 (Oct. 27, 2010), available at http://www.law.nyu.edu/news/BRENNAN_LECTURE_2010.

50 Daniel J. Hall & Thomas Clarke, *Delivering Judicial Services in Hard Times*, NAT’L CENTER FOR ST. CTS. (2008), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=121>.

51 Memorandum from Kateri Walsh, Or. State Bar Comm’n, to all Or. Presiding Judges & Trial Court Adm’r (Oct. 22, 2002) (on file with the Oregon Judicial Department).

52 See Or. Judicial Dep’t, *Impact of Five Special Legislative Sessions 2001–03 Biennium – General Funds Budget Only* (on file with the Kentucky Law Journal) for a comparison of the amount of salary reductions that were enacted in each of the Special Legislative Sessions during the 2001–2003 biennium and a break-down of the amounts reduced from the several specific categories of Oregon Judicial Department’s operations.

War II.⁵³ Therefore, while the inadequate funding of courts is no novelty, the duration and consequent depth of the present crisis most certainly is.

Although the judicial branch has a responsibility to share the burden of tough economic times, the structure and funding of courts also leaves the judiciary particularly vulnerable to economic flux. The executive and legislative branches are responsible for managing and apportioning state funds. Because those branches often lack the resources to gain a thorough understanding of how inadequate appropriations affect judicial operations, they rely on the recommendations of state budgeting bureaucracies. The net effect is that the judicial budget is treated, not as that of a co-equal branch of government, but akin to that of a state agency, subject to the same across-the-board agency cuts.

It is incorrect, however, to assume that such even-handed cuts will exact equal effects. Most state judicial appropriations are less than three percent of the state's general fund. In Oregon that number is approximately 2.3 percent.⁵⁴ In California, the nation's largest state court system, only 2.8 percent of the general fund is reserved for the legislative, judicial, and executive branches of government.⁵⁵ Out of those amounts personnel costs constitute, on average, approximately 85 percent of the judicial branch budget. Any reduction of judicial expenses will be effected through firing and pay cuts for judicial personnel. However, because many states have constitutional protections for judges' compensation during their tenure in office, these budget cuts, will have a disproportionate effect on the judicial personnel other than the judges themselves.⁵⁶ Furthermore, courts do not

53 Press Release, Bus. Cycle Dating Comm., *supra* note 46.

54 JOHN BORDEN & ROBIN LAMONTE, JOINT INTERIM COMM. ON STATE JUSTICE SYS. REVENUES, OREGON JUDICIAL BRANCH BUDGET, REVENUE, AND CASELOAD HISTORY 4 (2010), available at <http://www.leg.state.or.us/comm/lfo/justicerevenues/063010/Judicial%20Branch%20History.pdf>.

55 EDMUND G. BROWN, JR., STATE OF CAL., GOVERNOR'S BUDGET SUMMARY 2012-13, 2011-12 Reg. Sess., at 20, available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf>. Even though the California budget groups the legislative, judicial, and executive branches together, the percentage is, nevertheless, more comparable to the percentage within the Oregon budget than it would first appear. See BORDEN & LAMONTE, *supra* note 54, at 4. The California Judicial Branch occupies a larger proportion than the other branches within the group. The Judicial Branch category within the budget report includes the entire state-level judiciary and the Administrative Office of the Courts. *Id.* at 81. By comparison, the Executive Branch category is limited to the direct staff of the Governor. It does not include the state agencies that are under the direction of the executive branch. *Id.* at 83.

56 The constitutional protections for state court judges' salaries vary significantly between states. Although a complete comparison of the state constitutional protections for judicial salaries is beyond the scope of this article, these provisions can, generally be divided into three groups: those specifically protecting judges' salaries; those protecting all public officials' salaries; and those providing no guarantee for judicial salaries. A significant number of state constitutions contain guarantees similar to the United States Constitution's guarantee for federal judges, which provides that judicial compensation "shall not be diminished during [the judge's] Continuance in Office." U.S. CONST. art. III, § 1; see, e.g., CAL. CONST. art. III,

have large capital expenditures that can be set aside to survive periodic budget shortfalls. Ironically, while budget cuts are large enough to have instant, drastic effects on personnel and the court services that they provide, the amounts saved are too small to relieve the state deficit in any meaningful way. In fact, as shown in the studies set out below, reductions in court funding negatively affect state deficits and overall state economies. Unfortunately, that manner of funding also strains relations between branches where the judiciary is at the mercy of the executive and the legislature for its budgetary needs.

Nevertheless, the judiciary deserves priority funding, not only because it is a co-equal branch of government, but because courts stand at the intersection of every important social, political, and legal issue the states face. Ninety-five percent of all litigation in the United States is initiated in state courts.⁵⁷ In 2007, 18 million civil cases and 21 million criminal cases were filed in state courts, compared to 280,000 civil cases and 66,000 criminal cases filed in federal courts in that same period.⁵⁸ Despite that, legislators seem to de-prioritize judicial budgets. At the end of the 2011 legislative session, one Oregon senator voiced his frustration over the eleventh-hour consideration given the judicial budget, stating that “[o]nce again, here we are at the end of the session and we have the judicial branch budget before us And we have to make tough choices because it wasn’t prioritized and dealt with earlier.”⁵⁹

§ 4 (“[The Legislature] shall not reduce the salary of a judge during a term of office. . . .”); ILL. CONST. art. VI, § 14; MICH. CONST. art. VI, § 18; N.Y. CONST. art. VI, § 25(a); OR. CONST. art. VII, § 1; PA. CONST. art. V, § 16(a). Additionally, some state constitutions provide general compensation guarantees for all, or a set of public officials, which include state court judges. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 17 (“[N]or shall the compensation of any public officer . . . be increased or diminished during his term of office. . . .”); ARK. CONST. art. XIX, § 11 (listing specific public officials, including state court judges, whose salaries during their term of office are protected); NEB. CONST. art. III, § 19; KY. CONST. § 235; W. VA. CONST. art. VI, § 51(B)(5). However, there are some state constitutions that do not contain compensation guarantees for judges. *See, e.g.*, N.H. CONST. pt. 1, art. 35 (merely providing that “they should have honorable salaries, ascertained and established by standing law,” but containing no guarantee during the judge’s tenure in office).

57 R. LaFountain et al., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS, at iv (2010), *available at* <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.

58 Laurence H. Tribe, Senior Counselor for Access to Justice, U.S. Dep’t of Justice, Keynote Address at the Annual Meeting of the Conference of Chief Justices and Conference of State Court Administrators (July 26, 2010), in NAT’L CENTER FOR ST. CTS., FUTURE TRENDS IN ST. CT. 2011, at 1, 2, *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends/~media/Files/PDF/Information%20and%20Resources/TRENDS_book2011.ashx.

59 Matt Cecil, *Legislature Approves Budget for State Courts*, OR. CAP. NEWS, June 29, 2011, <http://oregoncapitolnews.com/blog/2011/06/29/legislature-approves-budget-for-state-courts/> (quoting Oregon Senator Doug Whitsett).

IV. AT THE CROSSROADS OF CITIZENS AND COURTS

Variations in funding levels, funding sources, and the incongruity in the consideration of judicial appropriations have left courts in many states hard-pressed to adequately perform their constitutionally required duties. The state court systems of California, Florida, and Oregon exemplify that concern.

In 2011, the California legislature cut \$350 million from the judicial branch and \$310 million from the court construction fund,⁶⁰ resulting in a cumulative deficit of \$20.4 million to the San Francisco Superior Court. The San Francisco Superior Court Executive Officer, T. Michael Yuen, announced dire outcomes.⁶¹ He projected that twenty-five courtrooms would be closed indefinitely in October, and under the ensuing reorganization only three of the seventeen civil trial departments would remain open. In September, 200 layoff notices would become effective, leaving the court with 280 employees out of what was 591 three years prior. The natural affects to the general public are substantial. Paying a traffic ticket was projected to take hours waiting in line, obtaining records would take months, it would be years before a case sees the inside of a courtroom, and getting a divorce would take eighteen months.⁶²

In Florida, a state with severe foreclosures, the judicial appropriation comes predominantly from the fees for those foreclosures. Nevertheless, the volatility of foreclosure filings led the court system to run a deficit in the last quarter of the 2010/2011 fiscal year. As a result, Florida Supreme Court Chief Justice Charles Canady sought and received a \$33 million dollar loan in emergency funding from the governor to cover expenses. At the beginning of the 2011/2012 fiscal year the court system already faces substantial deficits and will have to borrow \$54 million more just to get it through the first quarter; further loans will likely be necessary.⁶³

60 Press Release, Cal. Courts, Judicial Branch Budget Cuts: California Wrestles with Cuts to the Judicial Branch (July 26, 2011), *available at* <http://www.courts.ca.gov/14876.htm>.

61 Press Release, T. Michael Yuen, Court Exec. Officer of S.F. Superior Court, The San Francisco Superior Court Notifies the AOC of Reduced Clerks' Office Hours, Closure of 25 Courtrooms Effective October 3, 2011 (Aug. 3, 2011), *available at* <http://www.sfsuperiorcourt.org/Modules/ShowDocument.aspx?documentid=2895>.

62 *The Judicial System, the Feeblest Branch: An Underfunded Court System Weakens the Economy as well as Access to Justice*, ECONOMIST, Oct. 1, 2011, <http://www.economist.com/node/21530985> [hereinafter *The Judicial System, the Feeblest Branch*].

63 *The Official Newsletter of the State Courts System of Florida*, FULL CT. PRESS (Office of the State Court Adm'r, Tallahassee, Fla.), Summer 2011, at 3, *available at* http://www.flcourts.org/gen_public/pubs/bin/fcp_summer11.pdf. Florida's courts were funded primarily by the general budget at the start of the 2008 recession. *Id.* at 4. As foreclosures increased due to the housing market collapse that funding source began to dwindle, leading to a twelve percent reduction in court system's budget and the elimination of 290.5 positions between 2007 and 2009. *Id.* In order to find an alternate funding source, in 2009 Florida lawmakers created the State Courts Revenue Trust Fund, subsidized primarily by mortgage filing fees. *Id.*

In Oregon, courts saw a budget reduction of approximately 16 percent during the 2011 fiscal year from the previous biennium's already reduced budget. During the 2011 legislative session, the judicial branch requested \$403.6 million dollars just to maintain services at previous year levels. Yet, the legislature returned an approved budget of \$385 million,⁶⁴ leaving Oregon's judicial branch approximately \$19 million short of what it requires.

As funding is stripped away, court systems resort to institutionalized reactions, normalized over decades of chronic shortfalls:

- Layoffs
- Hiring freezes
- Furloughs and changes in work hours
- Defer pay raises and cost-of-living increases
- Delay filling judicial positions
- Reduce court services by hours, days, or not hearing certain types of cases
- Freeze spending in non-personnel areas (typically training, travel, and equipment purchase)
- Defer payment on goods and services to later fiscal years
- Limit or cancel civil hearings in deference to criminal and family issues⁶⁵

Unfortunately, such methods are mere stop-gap measures designed to weather a storm rather than deal with the problem long term.

In the interim, the long-term nature of the current funding crisis is creating dual systems of "justice." As the backlog of cases grows, so does the cost – in dollars and time – that it takes to bring a civil case to trial. In New Hampshire, for example, civil plaintiffs brought suit against the state and its treasurer to restore adequate permanent funding to the judiciary. The plaintiffs were allegedly damaged by trial delays brought on by budget-mandated court closures, furloughs, and reductions in judicial hours.⁶⁶ For some plaintiffs, the cost of waiting eventually will outstrip the potential

64 STATE OF OR. LEGISLATIVE FISCAL OFFICE, ANALYSIS OF THE 2011–13 LEGISLATIVELY ADOPTED BUDGET 387 (2011), *available at* <http://www.leg.state.or.us/comm/lfo/2011-13%20LAB.pdf>.

65 *The Judicial System, the Feeblest Branch*, *supra* note 62; WASH. ECON. GRP., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA'S COURTS DUE TO UNDER-FUNDING OF COURT SYSTEM 4–5 (2009) [hereinafter WASH. ECON. GRP., FLA.], *available at* http://www.ncsconline.org/D_Comm/News/Fla.study.011609.pdf.

66 See Lynne Tuohy, *NH Residents Sue State over Court Budget Cuts*, BOS. GLOBE, Sept. 28, 2010, http://www.boston.com/news/local/new_hampshire/articles/2010/09/28/nh_residents_sue_state_over_court_budget_cuts/.

benefit of a favorable verdict. When that happens, a litigant's financial state often will inform the litigant's options.

When litigants with sufficient money and resources are denied justice in the public courtrooms they can seek resolution in other forums, such as mediation and arbitration. Although such alternative methods of dispute resolution benefit efficiency and economy, they also "operate[e] outside the watchful gaze of the public and beyond the effective reach of the rule of law."⁶⁷

In contrast, "[f]or those litigants who *cannot* afford . . . private alternative[s], the natural response to a denial of public justice is more troublesome still. They must either suffer in alienated silence or take the law into their own hands."⁶⁸ The co-existence of these parallel, private legal systems reinforces the notion that justice is only for those who can afford it, and that the law applies differently to those who have the means.

Commercial interests face a different crossroads. Court delays can benefit large companies that would rather sit on a case instead of having to pay an insurance claim, for instance. In contrast, court delays can hold smaller companies hostage, powerless to invest or expand while their assets are tied up in litigation. Both of those effects contribute to the millions of dollars in direct state costs through job losses, uncollected taxes, and industrial out-put. Unfortunately, according to the multiplier effect, when indirect economic effects are accounted for, the same state losses can become billions.⁶⁹

A 2011 study concluded that court delays decrease a State's ability to improve communities and to attract and expand industries, which represent a deadweight cost to the State economy.⁷⁰ In Georgia, for instance, the total adverse impact on economic output ranged between \$337 million and \$802 million annually and could lead to a loss of jobs between 3,457 and 7,098

⁶⁷ Tribe, *supra* note 58, at 3.

⁶⁸ *Id.*

⁶⁹ Carol A. Dinkins et al., *Crisis in the Courts: Defining the Problem*, 302 A.B.A. REP. HOUSE DELEGATES 1, 5 (2011) [hereinafter A.B.A. REPORT 302], *available at* http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system.html (follow "Approved: HOD Resolution 302" hyperlink) ("The immediate loss of almost \$1.1 billion from the combined salaries of the laid-off court workers and the multiplier effect those direct losses would have on other workers in the local economy." (emphasis added)). See generally ROY WEINSTEIN & STEVAN PORTER, *ECONOMIC IMPACT ON THE COUNTY OF LOS ANGELES AND THE STATE OF CALIFORNIA OF FUNDING CUTBACKS AFFECTING THE LOS ANGELES SUPERIOR COURT* (2009), *available at* http://www.micronomics.com/articles/LA_Courts_Economics_Impact.pdf (analyzing the compounding impact on the general economy because of cutbacks resulting in an underfunded judiciary).

⁷⁰ WASH. ECON. GRP., *THE ECONOMIC IMPACTS ON THE GEORGIA ECONOMY OF DELAYS IN GEORGIA'S STATE COURTS DUE TO RECENT REDUCTIONS IN FUNDING FOR THE JUDICIAL SYSTEM 1* (2011) [hereinafter WASH. ECON. GRP., GA.], *available at* <http://www.gabar.org/public/pdf/news/2011%20Georgia%20Bar%20Economic%20Impacts.pdf>.

throughout the state.⁷¹ Unfortunately, the multiplier effect and deadweight costs remain unaccounted for by legislatures and the general public.

The judiciary's ability to meet constitutional mandates surely will be crippled if funding continues to be stripped away as a means to balance the state budgets. Moreover, the fragile public perception – that the legal system is only for those who have the coffers to afford it and the time to wait years, or at times decades, for justice to take its full course – will be confirmed. Indeed, our pledge of allegiance, instead of teaching children that in our nation they are free citizens who have the right to expect justice for all, will read more like a hollow punch-line at the end of a joke.

As some politicians have identified, inadequate court funding is “one of the reasons for the public's loss of respect for the judicial system.”⁷² What they have failed to add, however, is that regardless of the presence or absence of a crisis, lack of public respect is a deadweight cost that the judiciary, democracy, and justice, can least afford.

V. NOT WHERE DOES THE JUDICIARY GO, BUT HOW: THE LIMITS OF STOPGAP THINKING

Prominent indicators refer to the present economic climate as the “new normal.”⁷³ Consequently, to establish resilient court systems that are able to thrive in this climate, the judiciary must first discard any assumption that normalcy will return in any predictable, typical sense. Economists have cautioned that the recovery now underway will be slower and more modest than past rebounds.⁷⁴ In Oregon, general fund deficits in the range of 20 percent are expected to persist through 2019.⁷⁵ Historically, the worst budget crunch for states comes in the year or two after a recession ends.⁷⁶ As a result, according to the Pew Center on the States,

Once states get past the immediate crisis of plugging record-high budget gaps, they will confront the likelihood that the recession will impose permanent changes in the size of government and in how states

⁷¹ *Id.* at 1.

⁷² PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* 95 (2003).

⁷³ See PEW CTR. ON THE STATES, *STATE OF THE STATES 2010: HOW THE RECESSION MIGHT CHANGE STATES 2* (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/State_of_the_States_2010.pdf?n=5899.

⁷⁴ BRUCE GOLDBERG, OR. GOVERNOR'S RESET CABINET, *BEST STEPS FORWARD: A BUDGET BALANCING PATH TO RESET STATE GOVERNMENT & OVERCOME A DECADE OF DEFICITS 8* (2010), *available at* http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/docs/reset2_report_web.pdf.

⁷⁵ *Id.* at 6.

⁷⁶ PEW CTR. ON THE STATES, *supra* note 73, at 2.

deliver services, who pays for them, and which ones take priority in an era of competing interests.⁷⁷

In practical terms, that means the downsizing and streamlining, cost-shaving and cross-training that were once stopgap measures used to clear cyclical economic hurdles are now business as usual. It also means that a rebounding economy can no longer be relied on to forgive the unintended consequences of those hemorrhage-stemming decisions. All the while, the tertiary needs of courts cannot be put on hold while the judiciary searches for a permanent end to the funding rollercoaster. Although stopgap measures remain indispensable, stopgap thinking must be severed.

Stopgap thinking is behaving as if the symptoms of a problem are the problem. Settling for stamping out the same fires over and over by using the same fallback fixes, such as furloughs and closures, is stopgap thinking. Certainly, fires must be put out and mid-biennium cuts must be faced down but merely meeting the demands of each crisis as it arises is a thankless and losing proposition. Every successful belt-tightening simply precipitates another legislative cut. Stopgap thinking is an incremental ratcheting down of funding, expectations, morale, and services. And, as the wave of court closures across the country confirms,⁷⁸ such redundant squandering of resources is unsustainable. Yet, if future generations of courts are to be spared the same plight, the ongoing triage cannot be allowed to suspend the pursuit of primary long-term considerations and strategies.

The seriousness of the situation at hand and the history that precedes it demand meaningful change that involves a grander, more profound, and lasting shift. It is true that the judicial funding crisis is complex. The moving parts are countless. Since the reengineering of court structure, processes, and protocols will remain central, a grander, more profound shift will be one that pervades those tangibles. It will set the essence of judicial existence and public sentiment. That shift will be the conscious shaping, assumption, and assertion of an appropriate institutional identity: an identity that will merit and generate broad and durable public “buy-in.”

Buy-in of that nature, however, will not come by way of ease or hubris. Efforts must be earnest, sustained, and able to weather the wheel-spinning that invariably precedes traction. In this case that “traction” will be the key to judicial sustenance that pure stopgap thinking can never accomplish.

⁷⁷ *Id.* at 1.

⁷⁸ See generally *Economic Impact on the Courts*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Economic-impact.aspx> (last visited Mar. 26, 2012) (compiling press, reports, and relevant links regarding economic impact on courts).

VI. THE SWAP MEET OF CURES

As previously stated, judicial defunding is a hot topic. Rare is a day without a fresh headline espousing the fallout courts suffer⁷⁹ as budgets are repeatedly cut and courts flail to stem the hemorrhage. A quick online search reveals the growing abundance of ways courts can reengineer, reorganize, and strategize to weather the fallout of a still plummeting economy.⁸⁰

A 2011 Task Force for the Preservation of the Justice System report resulted in adoption of ABA Resolution 302 which resolves to (1) urge bar associations to document and publicize the effects of funding cutbacks; (2) urge state governments to fulfill their constitutional responsibility to grant the judiciary stable and predictable funding; (3) urge courts to employ best practices, efficient use of resources, and financial accountability; and (4) urge courts and bar associations to use advisory groups, civic education, and direct engagement with public officials to communicate the value of an adequately funded judiciary.⁸¹ The National Center for State Courts issued the 2010 Future Trends Report: a comprehensive compilation of articles that offer thorough analysis of trends across vast aspects of judicial reengineering.⁸²

Many, perhaps most states already have developed and published their own such lists or have announced relevant objectives in their annual state of the judiciary report.⁸³ The Oregon Judicial Department 2009–2013 Strategic Plan refines Oregon's goals into key performance areas that detail and prioritize separate action items. The plan identifies two items as essential because they span all other aims: implementation of Oregon eCourt (electronic court) and addressing the court facilities crisis. The balance of the plan sets out twenty-one strategically critical action items, and seventeen items to be addressed as time and resources permit.⁸⁴

79 *Id.*; see also *Task Force in the News*, A.B.A., http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system/in_the_news.html (last visited Dec. 27, 2011) (providing updated links to articles on state court underfunding).

80 *State Activities Map*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/States-activities-map.aspx> (last visited Jan. 15, 2012).

81 *Resolution*, 302 A.B.A. RESOL. HOUSE DELEGATES 1 (Aug. 9, 2011) [hereinafter *Resolution 302*], available at http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system.html (follow "Approved: House of Delegates Resolution 302" hyperlink).

82 *Trends in State Courts 2010: Special Feature on International Courts*, NAT'L CENTER FOR ST. CTS., <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605> (last visited Apr. 8, 2012).

83 *State of the Judiciary Quotes Related to Budgetary Issues*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/State-of-the-Judiciary-Quotes-Related-to-Budgetary-Issues.aspx> (last visited Jan. 15, 2012).

84 OR. JUDICIAL DEP'T, 2009–2013 STRATEGIC PLAN 25–26 (n.d.), available at

Among the myriad of reports, two things stand out. First, the crisis in each state involves a unique confluence of factors that no pat, single combination of measures will solve. Instead, states must craft their own recipe from the growing buffet of ideas. Ultimately, in the novel political economy that states now exist, trial and error will determine the efficacy even of evidence-based actions. Second, there is one objective that all plans have in common: outreach. Plans characterize this common objective differently: as communication to improve information sharing with the legislature and to promote public confidence, understanding, and collaboration;⁸⁵ to recruit stakeholder-advocates by explaining the value of an adequately funded judiciary;⁸⁶ and, to instruct on the dynamics of civic⁸⁷ or governmental partnerships. In addition, most, if not all, states and organizations call directly on judges to personally lead the charge.

The trend toward outreach is timely. Every budgetary allocation runs through the legislature and effective efforts to influence legislative decision-makers requires broader community involvement from outside the legal profession.⁸⁸ That is particularly true because courts are pursuing many strategies that will require budget approval, legislation, or constitutional amendments: for example, to assign the judiciary a set portion of the budget; to prohibit recapture of allocated funds; to manage surplus through a judicial stabilization fund; to enact a hands-off rule for submitted budgets; or a rule that bypasses the executive and ushers the judicial budget directly to the legislature. In Oregon, for instance, soon voters will have the opportunity to amend the state constitution to refer to the judiciary as a “branch” of government instead of a “department,” as the constitution does now.⁸⁹ That may be only a two-syllable shift, but harmonizing the state constitution with the federal constitution, on that point, can help avoid confusion and contention during future “co-equal branch,” and “separation of powers” conversations.

VII. PUBLIC RELATIONS AND INSTITUTIONAL IDENTITY

Judicial aspirations, like those described above, carry significant implications and will require significant public support. That being the case, it is odd that the communication-based plans mentioned earlier either stop short or shy away from calling the suggested “outreach” what it is – or perhaps, more accurately, what it needs to be – public relations. Outreach

oregon.gov/OJD/docs/OSCA/OJDStrategicPlan032009.pdf.

⁸⁵ Id. at 17.

⁸⁶ A.B.A. REPORT 302, *supra* note 69, at 15–18.

⁸⁷ *Trends in State Courts 2010*, *supra* note 82, at 1.

⁸⁸ A.B.A. REPORT 302, *supra* note 68, at 15.

⁸⁹ H.R.J. Res. 44, 2011 Or. Laws 1 (2011), *available at* <http://www.leg.state.or.us/11orlaws/sessresmem.dir/hjr0044.pdf>.

is insufficient. Even public awareness is shortsighted. Public relations, on the other hand, are more plausible way to achieve the quantum of buy-in necessary to soothe present and future crisis. Why that is yet to happen is worth examination.

Historically, the job description of a justice or judge has not included the title of “PR” director. Undoubtedly, some judicial careers have been chosen based on the appeal of that relative obscurity. That, however, is no longer the case, nor an option. For better or worse, the judiciary is being forced out from behind its pillars and robes and into the public relations business. And, quite frankly, who better to do it?

Initially, a public relations campaign may conjure up an endeavor too political for an impartial judiciary to undertake. That view holds merit to the extent it is derived from concerns regarding efforts to “forge . . . overt alliance[s] between the judiciary and the business community.”⁹⁰ In both Oregon⁹¹ and South Carolina,⁹² the Chief Justices, at different times, forged such overt alliances with the business community in an effort to lobby the legislature for judicial appropriations. As it turns out, both Justices did so successfully. But in the context of business related cases, where these overt alliances may subject the judiciary to public questioning of decisional independence, the courts should be careful not to create an appearance of favoritism, because as David J. Barron argues, “the concern about appearances is not trivial.”⁹³ The “public” in public relations, however, will help to dispel those concerns. The breadth and regularity of effective “public” relations will dilute the attention given to individual business interests and, by doing so, will disperse appearances of impropriety.

Moreover, in soliciting businesses to support judicial funding, it is not favorable courts, but open courts and timely dockets that are indispensable. When courts are accessible, the multiplier effect and subsequent deadweight costs are avoided.⁹⁴ Those costs refer to the compounding toll that underfunded courts cost state coffers through job losses, uncollected taxes, and industrial output.⁹⁵ Eventually, when the accrued burden of those tolls deprives a state of its ability to improve communities and expand industries, businesses and individuals both suffer. But states will

90 David J. Barron, *Judicial Independence and the State Court Funding Crisis*, 100 Ky. L.J. 755, 761 (2012).

91 A Message from the Chief Justice & the State Court Adm’r, in JUDICIAL DEP’T OF THE STATE OF OR., OREGON COURTS TODAY AND TOMORROW: ANNUAL REPORT OF THE OREGON JUDICIAL DEPARTMENT OUR STRATEGIC PRIORITIES FOR 2008 AND ACCOMPLISHMENTS OF 2007 (2008), available at http://courts.oregon.gov/OJD/docs/OSCA/2007_OJD_Annual_Report.pdf.

92 Cindi Ross Scoppe, Op-Ed., *How the Legislature Compromises Courts*, THE STATE (Columbia, S.C.), Mar. 10, 2011, at 6.

93 Barron, *supra* note 90, at 781.

94 See WASH. ECON. GRP., GA., *supra* note 70, at 1, 13.

95 *Id.* at 13–17.

not suffer in isolation. Without a rule of law “where a business can be sure that [its] . . . property will be protected and citizens will be free to speak their minds . . . nations will never fully realize their potential.”⁹⁶

Vice President Joe Biden recently commented that American “citizens are willing and able – and encouraged – to challenge authority and think differently, bringing about the innovations that enhance the nation’s ‘capacity to grow, compete and win.’”⁹⁷ According to Vice President Biden, in this country, those innovations are protected by the rule of law, and “[judges] are the glue that holds this all together.”⁹⁸

Judges may always have been the legal-glue, paving the way for innovators. Now, however, judges also must be innovators in their own right. Fittingly, public relations can be credited to this judicial innovation and chalked up to role reengineering. Public relations do not automatically implicate “the inherent and ethical limitations on judges’ involvement in the political process . . .”⁹⁹ Think of “PR” as a new judicial competency, to be incorporated no differently than hearing arguments or writing opinions. The truth is, the judiciary exists in a complex society at a time when every entity faces a common choice – evolve or become irrelevant. Moreover, whether the judiciary’s public relations campaign ultimately turns out to be pedagogical or political will be determined by the convictions, grace, and dignity of those who undertake it.

The more complicated aspect of this notion is that public relations campaigns generally revolve around an identifiable product, something that the public can envisage; be it an entity, image, presence, persona, or concept. Currently, however, the judiciary has an identity problem on three levels: first, it lacks public familiarity outside of intellectual circles or beyond the citizens with occasion to use the courts; second, it gets kicked under the umbrella of “government,” by default; and third, the nagging stereotype remains of robed intellectuals, invulnerably passing judgment from their marble-pillared fortress. However, identity, for the purposes of this discussion, stretches far beyond recognizing a court building from a passing car. This is about the institutional identity of the judiciary and its presence, or lack thereof, in the everyday lives of Americans.

A recent newspaper article illustrated the “government” effect and the judiciary’s quasi-invisibility. The title captured the subject matter: *Recession doesn’t slow travel on the public’s dime by Oregon government officials.*¹⁰⁰

⁹⁶ Sean O’Sullivan, VP Biden: Court System has Vital Role in Liberty, News J. (Wilmington, Del.), Jan. 31, 2012, <http://www.delawareonline.com/article/BL/20120131/NEWS02/201310332/VP-Biden-Court-system-has-vital-role-liberty> (emphasis added).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ A.B.A. REPORT 302, *supra* note 69, at 15.

¹⁰⁰ Harry Esteve, *Recession Doesn’t Slow Travel On the Public’s Dime by Oregon Government Officials*, THE OREGONIAN, Dec. 17, 2011, <http://>

The article aimed to disparage certain government agencies for their alleged spending habits in contrast to belt-tightening by families and small businesses. Midway through his commentary on poor agency behavior, the author championed the judicial department for having cut travel spending by nearly 35 percent, almost \$400,000; for suspending or disbanding statewide advisory and policy committees; and for sharply cutting training for judges and eliminating training for staff.¹⁰¹

What is worth sharing about that article is not its subject matter but the 159 comments on the article that followed. Notwithstanding the self-selection bias of commenters, the comments displayed an alarming lack of distinction between the agencies and the arms of government that were mentioned in the article. Scornful generalizations ran rampant. For example, as one person commented: “State government has made their choices, US versus THEM. It’s government spenders against government payers” – grossly commingling every organ of the state within the criticism.¹⁰² Vague references to “government,” were made – without specificity – no less than 96 times.¹⁰³ The number of comments that mentioned the judiciary – zero.

Self-selection bias, in this instance, is highly relevant and is not dispositive of this discussion. In fact, quite the opposite is true. It stands to reason that those who felt compelled to weigh in on that issue and in that manner may be apt to react similarly when other issues implicate “government,” at the ballot box, for instance. A recent newsletter found similar reader responses to articles on judicial funding cuts in California “disheartening but instructive.”¹⁰⁴ The author noted an important truth: the comments “reflect people’s attitudes, which in a budget fight we dismiss at our peril.”¹⁰⁵ Pushing that one step further, continued failure to engage public attitudes will always be at the peril of the judiciary, regardless of the crisis of the day.

In Oregon, about one in five citizens use the courts in a given year. That means that validating public attitudes will include reaching the 80 percent of residents who have no direct contact with the courts and whose sympathy will be less susceptible to tales of judicial woe and cuts in service. Any confidence lost, or absent, among that non-court-using majority is

www.oregonlive.com/politics/index.ssf/2011/12/recession_doesnt_slow_travel_b.html.

¹⁰¹ *Id.*

¹⁰² Ltjd, posted comment, (Dec. 17, 2011, 9:27 AM), in Harry Esteve, *Recession Doesn’t Slow Travel On the Public’s Dime by Oregon Government Officials*, THE OREGONIAN, Dec. 17, 2011, http://www.oregonlive.com/politics/index.ssf/2011/12/recession_doesnt_slow_travel_b.html.

¹⁰³ *Id.*

¹⁰⁴ Alex Aikman, *Why Not . . . Supplement the Thoughts in the July Issue of TOL about Budgets?*, in THINKING OUT LOUD, AN OCCASIONAL LETTER FROM ALEX AIKMAN, Oct. 2011, at 2 (on file with author).

¹⁰⁵ *Id.*

just as likely a consequence of the “government” effect, especially while legislative approval is at an all-time low.¹⁰⁶ A recent poll noted that a “broader distrust of government in general” may be responsible for a 15 percent drop in public approval of the Supreme Court in 2010.¹⁰⁷ That being said, the judiciary need not disparage its co-equal branches in order to distinguish itself, but it must distinguish itself, nonetheless. To do so, it must devise an identity and presence. Until it does that, it will be in no position to expect allegiance from the public. The generalized grievances lobbed at “government” will continue to implicate the judiciary by default.

A meaningful presence will be the outgrowth of a return to basics. It is up to judicial leaders to humble themselves to undertake a searching reassessment of what the judiciary is, what it means to be a judicial steward, and what representation should come to mind when citizens think of the judiciary. But that is not all. A lasting, institution-worthy presence will arise through the diligent screening of activities, processes, thoughts and conduct. The relevant inquiry is whether every action, inaction, and interaction on behalf of the judiciary, stands to promote institutional dignity, intra- and inter-branch respect, and public rapport. The quality and scope of the judiciary’s eventual institutional presence will depend on the running sum of the responses that surface.

VIII. THE DO’S AND DON’TS OF JUDICIAL SELF-DEFINITION

It will be up to judicial leaders to actively craft and defend the institutional character and presence of the judiciary. If they do not, outside comments and circumstances will. And until the judiciary finds a firm place on the public radar it will remain an easy target. Moreover, a frustrated public is particularly susceptible to disparaging suggestions about an institution, never mind a government institution, especially where they do not sense a presence to defend. Lest we forget, public perceptions are infinitely more difficult to dislodge than they are to inspire.

Something courts cannot afford to do is to sell one another down the river. Reports of questionable judicial conduct, have and will, color generalizations about the judiciary. A 2003 poll posed that the Executive and the Legislature were two branches of government and then asked respondents to name the third. Disappointingly, 43 percent of respondents did not know or answered incorrectly.¹⁰⁸ Certainly, a population that cannot

106 Jeffrey M. Jones, *Congressional Job Approval Ties Historic Low of 13%: Disapproval Rating of 84% Highest in Gallup Annals*, GALLUP (Aug. 16, 2011), <http://www.gallup.com/poll/149009/Congressional-Job-Approval-Ties-Historic-Low.aspx>.

107 Debra Cassens Weiss, *Supreme Court Approval Rating Drops, Nearing 2005 Low Point*, A.B.A. J. (Oct. 4, 2011, 10:12 AM), http://www.abajournal.com/news/article/supreme_court_approval_rating_drops_nearing_2005_low_point/.

108 George H. Gallup, Jr., *How Many Americans Know U.S. History? Part I*, GALLUP (Oct.

name or distinguish between governmental branches cannot be assumed to distinguish between courts by geography or jurisdiction. For that reason, a black-eye on one court is a black-eye on all courts.

In the past year, incidents of judicial tension sparked attention-grabbing headlines that raised questions about judicial integrity. *Justice' feud gets physical*,¹⁰⁹ and *Wisconsin Justice Says Court Fight Led to Choking*,¹¹⁰ appeared after a Supreme Court justice's hands found their way around another justice's neck during an argument in chambers. The truth of whether it was an act of self-defense, or more of a chokehold, or whether she had come at him with fists raised, is immaterial; the appearance is damning, regardless. To the chagrin of judges everywhere, the incident made national headlines.

Yet even when headlines remain sensible, disparaging remarks between government branches bode well for neither side in the eyes of the public. For example, in Massachusetts, communication between the Supreme Judicial Court and the Governor's office broke down when the judicial budget was reduced \$24.2 million below the previous year. Though related, the merits of the issue are not the focus here. What is noteworthy is the constitutional mugging to the media by the Governor's counsel in characterizing the situation as the court's "attempt to constrain the Governor's constitutional authority," where the "courts cannot manage their fiscal affairs."¹¹¹ Relevant judicial concerns were sloughed off as no more than "'posturing' by a branch with sagging morale among its workers," and judicial motives were questioned as "jockeying."¹¹² "We look forward to their explanation," the spokesperson continued, "[i]n the meantime, the Governor will continue to exercise the powers granted to him by the Constitution of this Commonwealth."¹¹³

Although four years of budget cuts had left Massachusetts courts \$95 million shy of peak funding, one executive branch spokesperson declared the court could cut "waste" and "fat" before resorting to the "overkill" of the sought after moratorium on judicial appointments.¹¹⁴ Another of the executive's councilors recognized "the brewing fight as a reflection of the dire fiscal situation of the courts," yet added that the executive and

21, 2003), <http://www.gallup.com/poll/9526/How-Many-Americans-Know-US-History-Part.aspx>.

¹⁰⁹ Crocker Stephenson et al., *Justices' Feud Gets Physical: Prosser, Bradley Clashed on Eve of Union Ruling*, MILWAUKEE J. SENTINEL, June 26, 2011, at A1, available at <http://www.jsonline.com/news/statepolitics/124546064.html>.

¹¹⁰ *Wisconsin Justice Says Court Fight Led to Choking*, FOXNEWS.COM (June 26, 2011), <http://www.foxnews.com/us/2011/06/26/wisconsin-justice-says-court-fight-led-to-choking/>.

¹¹¹ Michael Norton & Kyle Cheney, *Patrick Rejects Court Request to Halt Judicial Nominees*, DEDHAM TRANSCRIPT (July 13, 2011, 9:27 AM), <http://www.dailynewstranscript.com/news/x401791522/Patrick-rejects-court-request-to-halt-judicial-nominees##axzz1nziPGN83>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

the judiciary “understand that this is how the interplay of two branches of government try and sort out . . . responsibilities.”¹¹⁵ Unfortunately, that conclusion wholly overlooks the most important party – the citizens.

In that instance, the message to citizens smacked more of partisan bickering than of professional, inter-branch communication. Moreover, it does a public disservice when a message paints the acts of the judiciary as a deliberate affront to the constitutional powers of the Governor yet neglects to explain that the judiciary, also, has constitutional responsibilities. The unfortunate result is that any merit, underlying the truth or falsity of the accusations or the fact that the court refrained from firing back in the press, is skewed or lost. The general public is neither prepared nor inclined to sort out the substance or even the judicial role in such situations. Thus, although poor examples may be few in a relative sense, the institution will be judged by its worst elements, whether real or perceived. Jurisdictional boundaries will never confine bad impressions.

That consequence is further amplified because such incidents are taking place on a national stage during a frigid political climate. In 2011, more attempts were lodged to impeach state judges for their decisions, than in recent history and perhaps ever.¹¹⁶ “In all but two instances . . . the sole accusation was that the judge(s) in question issued opinions that displeased members of the legislature.”¹¹⁷ Anti-judicial sentiment in New Hampshire prompted an attempt to impeach the entire Superior Court,¹¹⁸ and during its 2012 session, New Hampshire’s legislature will entertain a proposed constitutional amendment to allow the legislature to determine the constitutionality of legislative acts.¹¹⁹

IX. THE IMPORTANCE OF FRAMING AND SINCERITY

Every chance to appear on behalf of the judiciary or to speak on court issues is an additional opportunity to distinguish and enhance judicial identity and presence. Accordingly, the ongoing inquiry is still whether what is said and done stands to promote institutional dignity, intra- and inter-branch respect, and public rapport. The calculation is not strict math.

¹¹⁵ *Id.* (alterations in original).

¹¹⁶ Bill Raftery, *2011 Year in Review: Record Number of Impeachment Attempts Against Judges for their Decisions*, GAVEL TO GAVEL (Dec. 27, 2011), <http://gaveltogavel.us/site/2011/12/27/2011-year-in-review-record-number-of-impeachment-attempts-against-judges-for-their-decisions/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Const. Amend. Con. Res. 28, 162d Sess. Gen. Ct. (N.H. 2012) (providing that the Supreme Court of New Hampshire shall determine the constitutionality of judicial acts and the legislature shall determine the constitutionality of legislative acts).

However, neither is there a need to plumb the depths of psychological science to appreciate how impressions are formed.

How issues are framed and analyzed is an important inquiry. That is especially true because many presentations, symposiums, and workshops are archived in audio or video format that later can be used for outreach, teaching, or personal knowledge. Participants in forums are no longer just brainstorming solutions, they are creating valuable tools, which can be helpful in formulating institutional identity.

Consequently, even when participating on a panel in the comfortable presence of peers, how a thought is couched will affect the usefulness of a discussion, both contemporaneously and as recorded. For instance, to off-handedly coin the judicial funding crisis in combative or winner-take-all terms, limits the use of that discussion. The rubric is, does each representation distinguish the judiciary from the “government” that provoked the ire of the commenters mentioned above, or does it play into the stereotypical partisan bickering from which the judiciary must distance itself? Even in jest, to risk such interpretation is too costly.

When a state’s chief justice trumpets that, “[f]or the first time, we have a completely Republican Supreme Court and I am honored to be able to serve [on it],”¹²⁰ it is likely that many of his contemporaries shudder outright. Yet, it is similarly ill advised to casually urge that outreach is a matter of marching out the Chief Justice after inviting stakeholders to convene at the courthouse,¹²¹ or holding legislative hearings to trot in some sob stories.¹²² Such dicta gives the impression that invitees should be flattered to be included and it cheapens potential efforts between branches. Again, even when an attitude is merely careless or subconscious, anything that may be perceived as stereotypical government arrogance ratchets the stature of the judiciary down to the level of its detractors.

It is not even safe to resignedly comment that “the judiciary isn’t a particularly powerful advocacy group,”¹²³ because of the tendency to foreclose hope that the judiciary might become a powerful advocacy group. And what purpose is served by commenting that it is “difficult for members

¹²⁰ Patrick Johnston, *Why Brag About a Partisan Court?*, EUFAULA TRIB., Jan. 27, 2012, <http://www2.eufaulatribune.com/news/2012/jan/27/why-brag-about-partisan-court-ar-3123316/>.

¹²¹ *Panel Discussion on Justice Underfunding Features: Justice O’Connor, Theodore B. Olson, and David Boies*, ABANOW.ORG (Aug. 22, 2011), <http://www.abanow.org/2011/08/justice-underfundin-panel-features-justice-oconnor-theodore-b-olson-and-david-boies/>.

¹²² *Id.*

¹²³ James Podgers, *In Defense of the Courts: Symposium Finds No Easy Way to Fund Courts*, A.B.A. J., Nov. 2011, at 56 (quoting Erwin Chemerinsky, Opening Remarks at University of Kentucky Symposium on State Court Funding (Sept. 23, 2011)), *available at* http://www.abajournal.com/magazine/article/in_defense_of_the_courts_symposium_finds_no_easy_way_to_fund_courts/.

of the judiciary to lobby legislators,”¹²⁴ when members of the judiciary are paid to do difficult things?

Finally, to suggest that the judiciary does not have a constituency is, perhaps, the riskiest comment of all. To circulate that remark is to dismiss the potential constituency by sweeping it from the list of options. Whereas constituencies are invited to dine along party lines with respect to legislative and executive loyalties, the judiciary does not automatically fracture potential support in that way. As a result, the judiciary actually has the richest potential constituency among the co-equal branches. To hint otherwise is to disenfranchise the very resource on which the nature of the judiciary’s future depends.

CONCLUSION

The current state court funding crisis is the result of many things. There is, however, one injuriously overlooked factor that underlies all others: the judiciary occupies no conversational-presence on the public radar. “The silence is deafening,” the court funding crisis is “not being talked about around the dinner tables of America.”¹²⁵ That silence goes far beyond any scarcity of civic education, political leverage, or funding. It is bigger than that. And that lack of notoriety must change.

The task at hand is clear. First, a judicial identity must be established. Then a presence in the working-knowledge of the citizens must be developed. From there, public buy-in must be earned. When it is, the public will become aware of the role of the judiciary, the gravity of what is at stake, and the necessity for change that will facilitate resilient courts and, ultimately, resilient justice.

Recent creative efforts point encouragingly in the right direction. California produced a catchy YouTube announcement that hits the high-points of the current funding crisis and why judicial funding matters.¹²⁶ The Massachusetts Bar Association commandeered billboards along choice stretches of heavily traveled interstate.¹²⁷ Even Sesame Street rolled out a segment featuring United States Supreme Court Justice Sonia Sotomayor settling a dispute between Baby Bear and Goldilocks.¹²⁸

¹²⁴ *Id.*

¹²⁵ *Id.* at 57 (quoting John R. Broderick Jr., Remarks at University of Kentucky Symposium on State Court Funding (Sept. 23, 2011)).

¹²⁶ *Stand Up for Justice*, YOUTUBE.COM (Jan. 12, 2012), <http://www.youtube.com/watch?v=yzhErnUBxyQ>.

¹²⁷ Chris Reidy, *MBA Billboard Ads Urge Voters to Support More Funding for the State’s Court System*, BOS. GLOBE (Jan. 17, 2012, 9:47 AM), <http://www.boston.com/Boston/business-updates/2012/01/mba-billboard-ads-urge-voters-support-more-funding-for-the-state-court-system/pNBYuoQ3jvEeO3Oz8z4vzl/index.html>.

¹²⁸ *Sesame Street: Sonia Sotomayor: “The Justice Hears a Case”*, YOUTUBE.COM (Feb. 3, 2012), <http://www.youtube.com/watch?v=FizspmIJbAw>.

Numerous ongoing programs deserve continued support. Justice Sandra Day O'Connor's iCivics program belongs in every elementary classroom.¹²⁹ The majority of State Supreme Court arguments are webcast. In addition to those examples, efforts to personalize the judiciary must be taken up with vigor—inside and outside of courts. Kansas' You Be the Judge program,¹³⁰ and the A.B.A. Least Understood Branch program,¹³¹ are examples of external outreach programs. Inside of courts, jury instructions can and should be a Constitutional education¹³²—but why stop there? Courts also can thread the principles of sincerity and presence discussed here throughout the juror experience, and by doing so, make courts and jurors comrades, in justice and in life. It is up to courts whether jurors go home feeling inconvenienced, or feeling enlightened and engaged. The “buy-in” championed here will require the latter. In fact, until such connections are commonplace, as courts do increasingly more and budgets continue ratcheting downward, even the most ingenious reengineering will be no more effective than rearranging deck chairs on the Titanic.

It is imperative that the courts lead by example. Courts must open the door, extend the hand, recognize the current cramped and warring socioeconomic demands on citizens and then courts must seek to respond to those demands. This will not be accomplished through a sense of importance or owed loyalty, but rather by establishing a presence that is worthy of respect and relative importance among those concerns. That is the essence of buy-in and it will only come from public relations.

¹²⁹ iCivics, <http://www.icivics.org/> (last visited Dec. 29, 2011).

¹³⁰ Press Release, Joe Pierron, Judge, Kan. Court of Appeals, You be the Judge – The United States Supreme Court in Review: Outreach to Student and Adult Audiences (June 29, 2011), *available at* <http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/PublicDocuments/YBJarticle.pdf>.

¹³¹ *Resource Kit on Fair and Impartial Courts*, A.B.A., http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_kit_on_fair_impartial_courts_lub.html (last visited Dec. 27, 2011).

¹³² See Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education: Reclaiming the Lessons of Jury Service*, 84 U. COLO. L. REV. (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014089.

